

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:NR:HOU:2:POSTU 168729-01
NGraml

date: August 9, 2002

to: Bernard H. Falk, Team Coordinator
LMSB, Natural Resources, Houston

from: Area Counsel
(Natural Resources:Houston)

subject: [REDACTED] and Subsidiaries (Taxpayer)

EIN: [REDACTED]
Taxable Years ending November 30, [REDACTED] and November 30, [REDACTED] (Taxable years in issue)

You requested our opinion regarding the issue, below. This advisory opinion is preliminary and is subject to revision by the Office of Chief Counsel. We will contact you within two weeks regarding whether our National Office has approved or amended this advice.

ISSUE

What is the proper entity to execute an agreement to furnish a surety bond to the Service (as security for a refund to be paid before the examination of the refund claim is completed) where the consolidated group taxpayer-parent for the taxable years in issue merged into another corporation subsequent to the taxable years in issue and continued to survive as a subsidiary of the new corporation?

CONCLUSION

We advise that Taxpayer should execute the surety bond agreement as follows:

In the first line of the Agreement, characterize Taxpayer name and include the EIN as follows:

[REDACTED] (EIN [REDACTED]) and Subsidiaries
consolidated group

Above the signature line for Taxpayer, characterize Taxpayer common parent as follows:

[REDACTED]

Below the signature line, type Taxpayer common parent authorized agent name and his/her title relating to the common parent. For example, "Jane Doe, Treasurer."

FACTS

Taxpayer filed its consolidated Forms 1120 for the taxable years in issue ([REDACTED] and [REDACTED]) and for taxable years ending November 30, [REDACTED] and November 30, [REDACTED] ([REDACTED] and [REDACTED] respectively), in the name of " [REDACTED] and Subsidiaries." [REDACTED] was Taxpayer's common parent. In [REDACTED] Taxpayer filed consolidated Forms 1120X for the taxable years in issue, in which it claimed foreign tax credits carried back from [REDACTED] and [REDACTED] in the amount of \$ [REDACTED]. This would result in an income tax refund in the same amount for the taxable years in issue. The Service is in the process of examining Taxpayer's liabilities for [REDACTED] and [REDACTED]. The examination will take longer than 6 months to complete. The taxpayer wants to expedite payment of the refund. To do this, the taxpayer must first provide the Service with an irrevocable bank letter of credit or a surety bond prior to payment of the unexamined claim. The taxpayer and the Service are going to enter into an agreement concerning the surety bond.

In [REDACTED], [REDACTED] merged into [REDACTED] as follows: [REDACTED] ([REDACTED]), a wholly owned subsidiary of [REDACTED] merged into [REDACTED]. The separate corporate existence of [REDACTED] ceased and [REDACTED] continued as the surviving corporation. All outstanding [REDACTED] common stock was converted to [REDACTED] common stock and, apparently subsequently, all outstanding [REDACTED] stock was canceled and automatically converted to [REDACTED] common stock. [REDACTED] is now a wholly-owned subsidiary of [REDACTED], continues to exist, retains its original EIN, but ceases to be the common parent in its consolidated group. Former [REDACTED] shareholders now own less than [REDACTED] percent of [REDACTED] common stock.¹ At least one of [REDACTED]'s previous subsidiaries remains affiliated with [REDACTED] and the former consolidated group continues with a new common parent, [REDACTED].

LAW AND ANALYSIS

A "common parent" is a corporation that files income tax returns on a consolidated basis for an affiliated group of corporations. See I.R.C. § 1504(a); Rev. Proc. 99-9, 1999-1 C.B. 278. Treas. Reg. § 1.1502-77(a) generally provides that the common parent for all purposes (except those not applicable herein) shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. The common parent in its name, like [REDACTED] can give bonds. Any bond so given will be considered as having also been given by each such subsidiary. See Treas. Reg. § 1.1502-77(a). These provisions apply whether or not "a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time." *Id.*

¹ Taxpayer characterizes this reorganization as a "reverse subsidiary merger" followed by an "upstream merger" under I.R.C. § 368(a)(1)(A)(statutory merger or consolidation). See Rev. Rul. 2001-46.

The above regulation applies and governs the issue herein. Because the former common parent, [REDACTED], continues to exist and no regulatory exceptions apply,² [REDACTED] is the only agent that can execute the security agreement to furnish a surety bond for the taxable years when it filed returns as a common parent, regardless of its current subsidiary status. This executed agreement binds [REDACTED] and all other consolidated group members for the taxable years in issue.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions, please call me at (281) 721-7358. Thank you

By: _____
NANCY GRAML
Senior Attorney (LMSB)

² Where the common parent ceases to be the common parent of the group by way of a reverse acquisition and continues to exist as a subsidiary of the continuing group, the alternative agent rules apply only where the question concerns a notice of deficiency or waiver of statute of limitations. See Treas. Reg. § 1.1502-77T. This is not the case here. The reverse acquisition rule provides that an affiliated group will not terminate where the stock or assets of the common parent are acquired by another corporation in exchange for the stock of that other corporation, provided that the shareholders of the acquired common parent, after the acquisition, own more than 50 percent of the value of the acquiring corporation's stock. See Treas. Reg. § 1.1502-75(d)(3)(I). The known facts do not indicate a reverse acquisition.